

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HP TUNERS, LLC, a Nevada limited  
liability company,

Plaintiff,

v.

KEVIN SYKES-BONNETT, SYKED ECU  
TUNING INCORPORATED, a Washington  
corporation, and JOHN MARTINSON

Defendants.

Cause No. 3:17-cv-05760 BHS

**DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

**Note On Motion Calendar:**  
**September 6, 2019**

**Oral Argument Requested**

Defendants Kevin Sykes-Bonnett, John Martinson and Syked ECU Tuning, Inc. (collectively "Syked Tuning") hereby move for partial summary judgment that the automobile tuning software created, distributed, used or otherwise commercialized by Syked Tuning *does not* contain any purported trade-secrets or other intellectual property claimed by Plaintiff HP Tuners, LLC ("HP Tuners"). and that Syked Tuning's continued commercialization of its tuning software infringes no legitimate right of HP Tuners.

After months of scorched-earth discovery with which this Court is by now well familiar, HP Tuners has failed to find any evidence, much less "smoking gun" evidence that any of its purported proprietary information is included in the Syked Tuning software. Indeed, following a three-day inspection and review of the Syked Tuning software, HP Tuners' own software experts were unable to point to any clear copying or identity of code between the Syked Tuning software and that of HP Tuners.

Because HP Tuners lacks evidence that its own software was copied or otherwise incorporated into Syked Tuning's software, partial summary judgment that Syked Tuning

1 may continue to commercialize its tuning software without interference from HP Tuning is  
2 appropriate and should be granted.

3 Factual support for this motion is provided in the accompanying declarations of Kevin  
4 Sykes-Bonnett and Philip P. Mann.

## 5 LEGAL STANDARDS

### 6 A. Summary Judgment

7 Summary judgment is appropriate if, viewing the evidence and all reasonable  
8 inferences drawn therefrom in the light most favorable to the nonmoving party, the moving  
9 party shows that "there are no genuine issues of material fact and the movant is entitled to  
10 judgment as a matter of law." Fed. R. Civ. P. 56(a); *Torres v. City of Madera*, 648 F.3d 1119,  
11 1123 (9th Cir. 2011). The moving party "bears the initial responsibility of informing the  
12 district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).  
13 On an issue where the nonmoving party will bear the burden of proof at trial, the moving  
14 party can prevail by pointing out that the nonmoving party lacks evidence to support its case.  
15 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

16 If the moving party meets its initial burden, the opposing party must then set out  
17 "specific facts" showing a genuine issue for trial in order to defeat the motion. *Id.* "The mere  
18 existence of a scintilla of evidence in support of the nonmoving party's position" is not  
19 sufficient; this party must present probative evidence in support of its claim or defense. *Arpin*  
20 *v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). An issue is genuine  
21 only if there is a sufficient evidentiary basis on which a reasonable finder of fact could find  
22 for the nonmoving party. *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008).

23 To defeat a motion for summary judgment, the non-moving party must "do more than  
24 simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec.*  
25 *Indus. Co. v. Zenith Radio Corp.*, 415 U.S. 574, 586-87 (1986); see also *Podohnik v. U.S.*  
26 *Postal Service*, 409 F.3d 584, 594 (3d Cir. 2005) (stating party opposing summary judgment  
27 "must present more than just bare assertions, conclusory allegations or suspicions to show the  
28 existence of a genuine issue") (internal quotation marks omitted). Although the "mere

1 existence of some alleged factual dispute between the parties will not defeat an otherwise  
 2 properly supported motion for summary judgment,” a factual dispute is genuine where “the  
 3 evidence is such that a reasonable jury could return a verdict for the nonmoving party.”  
 4 *Anderson v. Uberty Lobby, Inc.*, 411 U.S. 242, 247-48 (1986).

## 5 **B. Trade-Secrets**

6 HP Tuners' vaguely pleaded claims for theft of trade-secret are brought under the  
 7 "Defend The Trade Secrets Act, 18 U.S.C. § 1836" (Count II), the "Washington Uniform  
 8 Trade Secret Act RCW 19.108" (Count III) and the "Illinois Trade Secrets Act, 765 ILCS  
 9 1065/1, Et. Seq." (Count IV). Despite these separate acts, the elements of trade-secret theft are  
 10 all essentially the same. A necessary requirement in all cases is that there, in fact, be a trade-  
 11 secret. The existence of a trade-secret is something the claimant, i.e. HP Tuners, must prove  
 12 as part of its case in chief.

13 For information to qualify as a trade secret, it must be secret. *Confederated Tribes of*  
 14 *Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 749, 958 P.2d 260 (1998); *Buffets, Inc. v.*  
 15 *Klinke*, 73 F.3d 965, 967–68 (9th Cir. 1996) (applying the Washington UTSA). Information is  
 16 not secret if it is in the public domain, may be readily ascertainable from another source, or is  
 17 not materially different from a competitor's information. *Robbins, Geller, Rudman & Dowd,*  
 18 *LLP v. State*, 179 Wn. App. 711, 722, 328 P.3d 905 (2014); *Plymouth Grain Terminals, LLC*  
 19 *v. Lansing Grain Co., LLC*, No. 10-CV-5019-TOR, 2013 WL 12177037, at \*15 (E.D. Wash.  
 20 Dec. 20, 2013) (applying Washington state law); *McCallum v. Allstate Prop. & Cas. Ins. Co.*,  
 21 149 Wn. App. 412, 426 (2009).

22 “For a trade secret to exist, the underlying information must not be readily  
 23 ascertainable by proper means from another source.” *Plymouth Grain Terminals*, 2013 WL  
 24 12177037, at \*15. Under the UTSA, “the existence of a trade secret [is] measured by the  
 25 accessibility of the information within a given industry, *i.e.*, the persons who can obtain  
 26 economic value from its disclosure or use.” *Precision Moulding & Frame, Inc. v. Simpson*  
 27 *Door Co.*, 77 Wash. App. 20, 26–27, 888 P.2d 1239, 1243 (1995). When courts face the  
 28

question of whether information is “reasonably ascertainable,” they will look “to the degree of time, effort, and expense required of a defendant to acquire or reproduce the alleged trade secret information by other proper means.” *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 918 (1993) (interpreting the phrase “readily ascertainable” in Indiana’s UTSA). “[A] trade secret may exist where the duplication of effort was time-consuming, relatively time-consuming and expensive, or producible after significant time, effort and expense.” *Id.* (citations omitted). Research must be fairly inconvenient or difficult for trade secret status to be conveyed. *Id.* “A plaintiff may not ground a misappropriation claim on matters that are common or obvious in the relevant industry.” *Think Village-Kiwi, LLC v. Adobe Sys., Inc.*, No. C 09–04166, 2009 WL 3837270 (N.D. Cal. Nov. 16, 2009) (interpreting “readily ascertainable” in California’s UTSA).

## ARGUMENT

### A. HP Tuners Has Not Yet Identified What Its Purported Trade-Secrets Are.

More than one-and-one-half years into this case, HP Tuners has yet to specify what its alleged trade-secrets are, and has yet to offer one shred of evidence that the software or "source code" of any Syked Tuning product contains any source code or other proprietary information of HP Tuners.

In its July 27, 2018 answers to Syked Tuning’s interrogatories, HP Tuners declined to identify with specificity what its purported trade-secrets are. When asked, for example, to “Describe the factual basis, and identify all facts known to support your allegation that Defendants copied your proprietary and confidential source code, supplied by a third party, and incorporated that source code, including but not limited to your parameters lists, into Defendants’ systems” HP Tuners, in response, answered that:

Subject to and without waiving said objections, the Exhibits to the Amended Complaint, the Parameters List attached as an Exhibit to the Amended Complaint, the Declaration of Matt Kaiser and the statements made therein, the statements made by Tim Milliken regarding Defendants’ conduct in this regard, the online posts, messages and communications made by Kevin Sykes-Bonnett, and Kevin

1 Sykes-Bonnett's attempted sale of a hacked interface and destruction of same all  
2 support HPT's claims herein. Investigation continues.

3 (P. 3, Exhibit A to Mann Declaration.)

4 The Exhibits attached to the Amended Complaint, along with the statements made by  
5 Mr. Milliken and Mr. Sykes-Bonnett, do not, and cannot, establish the existence of actual and  
6 protectable trade-secrets owned by HP Tuners. Furthermore, HP Tuners has not  
7 supplemented its interrogatory answers to identify in any detail what its purported trade-  
8 secrets are or how such unidentified trade-secrets are incorporated into Syked Tuning's  
9 software. To date, and long after the close of discovery, HP Tuners has been either unwilling  
10 or unable to identify what its supposed trade-secrets are. Given that establishing the existence  
11 of a trade-secret is the very first requirement of proving a theft of trade-secret claim, HP  
12 Tuners' failure in this regard is fatal to its case and makes appropriate partial summary  
13 judgment in favor of Syked Tuning on the claim that the Syked Tuning software somehow  
14 infringes any right of HP Tuners.

15 **B. HP Tuners' Own Software Experts Failed To Find Any "Copying" Or Other**  
16 **Misappropriation In The Syked Tuning Software.**

17 Incredibly, throughout most of this case, HP Tuners has gone out of its way *not* to  
18 conduct a proper forensic review of the very Syked Tuning software it alleges was copied  
19 from its own source code. The facts in this regard are detailed in Defendants' pending Motion  
20 for Protective Order (Docket No. 161) filed April 5, 2019.

21 In particular, HP Tuners provided a series of excuses to avoid conducting an experts'  
22 review of the Syked Tuning source code despite Syked Tuning's willingness and repeated  
23 offers to make it available for inspection and review.<sup>1</sup> At the end of the Court-ordered period  
24 for doing so and with the deadline for serving expert reports looming, HP Tuners, between  
25 April 3-5, 2019, finally brought in its software experts to review the Syked Tuning source  
26

27 <sup>1</sup> Syked Tuning was more than willing to do so, of course, because it *knew* that its own source code  
28 was not copied from HP Tuners and that an honest expert review would confirm that fact.

1 code. In their expert report issued April 22, 2019<sup>2</sup>, the experts retained by HP Tuners were,  
 2 not surprisingly, unable to find any copying on the part of Syked Tuning and instead claimed  
 3 that “interference” by Syked Tuning prevented them from finding what they had hoped.

4 The fact is that HP Tuners’ own experts have been unable to find any copying or other  
 5 identity between the Syked Tuning software and that of HP Tuners. The fact is that Syked  
 6 Tuning developed its software in 2014, well before it ever received any source code from HP  
 7 Tuners. (Sykes-Bonnett Declaration ¶¶2&3.) The fact is that Syked Tuning made absolutely  
 8 no use of HP Tuners’ software in developing its own software. *Id.* Indeed, and in light of the  
 9 extensive discovery provided by Syked Tuning to HP Tuners throughout this case, as well as  
 10 the detailed deposition testimony of Mr. Sykes-Bonnett himself, HP Tuners is well aware of  
 11 how the Syked Tuning software was created, what sources were used in the creation of the  
 12 Syked Tuning software, and that, to the extent there are any similarities between the Syked  
 13 Tuning software and that of HP Tuners, it is because *they were each copied from the same*  
 14 *outside source.* (Sykes-Bonnett Declaration ¶¶4&5.) This is not evidence that Syked Tuning  
 15 copied from HP Tuners. Instead, it is evidence that HP Tuners copied from third party  
 16 sources as well. If this case goes to trial, Syked Tuning has ample evidence to show that HP  
 17 Tuners either copied elements of Syked Tuning’s software or, more likely, copied its  
 18 programs from the same third party sources used by Syked Tuning. Relying on the same third  
 19 party source in developing their respective programs does not, and cannot, make Syked  
 20 Tuning liable to HP Tuners. It is the height of arrogance and irony to claim otherwise.

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 26 2 As the Experts’ Report has been designated by HP Tuners as “Highly Confidential – Attorneys’  
 27 Eyes Only,” the Report is not directly quoted or otherwise included here. Subject to HP Tuner’s consent and  
 28 approval, Defendants have no objection to making the report available to the Court on whatever terms of  
 confidentiality HP Tuners’ requires.

**C. Because There Is No Evidence That The Syked Tuning Software Was Either Copied From HP Tuners' Software Or Incorporated Any Purported "Trade-Secret" Owned By HP Tuners, Partial Summary Judgment Should Be Granted In Favor Of Syked Tuning.**

In this case, HP Tuners has served over 130 separate requests for production of documents. It has taken depositions of at least ten witnesses. As this Court is well aware, HP Tuners has left no stone unturned in discovery, and Syked Tuning has turned over to HP Tuners virtually all documents in its possession. Syked Tuning, at great risk to itself, has even made its own highly valuable source code available to HP Tuners' software experts for analysis and review. Furthermore, the individual defendant, Kevin Sykes-Bonnett has turned over to HP Tuners his own, personal, social media and financial records that go far beyond his activities relating to Syked Tuning. In short, HP Tuners has received virtually everything it has requested in this case.

Despite this exercise in overkill on the part of HP Tuners, there is simply no evidence that the Syked Tuning software incorporates anything copied from HP Tuners. Indeed, HP Tuners' own software experts confirm that. To the extent there are any similarities between the Syked Tuning software and that of HP Tuners, HP Tuners *is well aware* of why that is and is well aware that those similarities do not stem from any copying of HP Tuners' software on the part of Syked Tuning.

Furthermore, and to the extent HP Tuners still contends that Syked Tuning somehow used HP Tuners' "trade-secrets" in its software, HP Tuners has not met the very first step of actually establishing the existence of the trade-secret that was supposedly misappropriated. Proving the existence of a trade-secret, and identifying with specificity what that trade-secret is, is a necessary element of any trade-secret claim, whether brought under Washington State Law, Illinois law, or Federal Law. HP Tuners's failure to identify with specificity what trade-secret was supposedly stolen dooms its claim that the Syked Tuning software includes such secrets. Given that HP Tuners has not and cannot identify any particular "trade-secret," it claims Syked Tuning stole, there is no surprise that HP Tuners' own software experts were

1 unable to identify any such theft either during their inspection of the Syked Tuning software  
2 or in their expert report.

3 Given that HP Tuners has not, and cannot, provide evidence that the Syked Tuning  
4 software was copied from HP Tuners' software or incorporates (so far unidentified) trade-  
5 secrets of HP Tuners, partial summary judgment that the Syked Tuning software does not  
6 infringe any right of HP Tuners is appropriate and should be granted.

### 7 CONCLUSION

8 For all the foregoing reasons, Defendants respectfully request that this Court enter  
9 partial summary judgment that the Syked Tuning software at issue in this matter does not  
10 infringe any right of HP Tuners and that all claims based on such allegations be dismissed  
11 from this action.

12 Dated July 31, 2019.

Respectfully submitted,

13 /s/ Philip P. Mann

14 Philip P. Mann, WSBA No: 28860

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**CERTIFICATE OF SERVICE**

I hereby certify on the date indicated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties who have appeared in this matter.

DATED: July 31, 2019

/s/ Philip P. Mann